APR 26 1973

MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-5831

EDNA ROTHSTEIN, SYLVIA MILLER, HENRIETTA BATSON, CATHERINE JONES and DOLORES HARVENEK, as individuals and on behalf of all other persons similarly situated,

Petitioners,

—against—

GEORGE K. WYMAN, as Commissioner of the Department of Social Services of the State of New York, and the Department of Social Services of the State of New York,

Respondents.

PETITION FOR A REHEARING FROM DENIAL OF A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION NOT PRINTED

RESPONSE NOT PRINTED

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Statement of the Case

This is a petition filed pursuant to Rule 58(2) of the rules of this Court, for a rehearing of a petition for a writ of certiorari filed by petitioners on December 6, 1972, and denied by this Court on April 3, 1973. Mr. Justice Douglas and Mr. Justice White would have granted certiorari.

Grounds for Rehearing

Subsequent to the filing of the petition herein[1] the Seventh Circuit rendered a decision in *Jordan* v. *Weaver*, 472 F.2d 985 (7th Cir. Jan. 18, 1973), which conflicts with the decision of the Second Circuit in the instant case and creates a direct conflict in the circuits.

In the instant case the court below held that a Federal District Court does not have jurisdiction to award retroactive public assistance benefits denied in violation of Federal law finding that the Eleventh Amendment barred such payments as a money judgment against the State.

In *Jordan*, the Seventh Circuit held that the Eleventh Amendment does not bar such payments. The Seventh Circuit stated:

> "We recognize that the Second Circuit came to a contrary conclusion in *Rothstein* v. *Wyman*, 467 F. 2d 226 (2nd Cir. 1972), but are unpersuaded by its reasoning." *Jordan* v. *Weaver, supra*, at p. 990.

The Seventh Circuit reasoned that:

(1) The affirmances by the Supreme Court in *Sterrett* v. *Mothers & Childrens Rights Organization*, —— U.S. ——, 41 U.S.L.W. 3182 (October 10, 1972), affirming unreported order and judgment, N.D. Ind. April 14, 1972 on remand from *Carpenter* v. *Sterrett*, 405 U.S. 971; *State Dep't of Health and Rehabilitative Services* v. *Zarate*, 407 U.S. 918, affirming unre-

[1] Petitioners rely upon and will refer to the appendix and other pertinent parts of their filed petition of December 6, 1972.

ported decision, S.D. Fla. Sept. 29, 1971, January 20, 1972; *Wyman* v. *Bowens*, 397 U.S. 49 affirming *Gaddis* v. *Wyman*, 304 F. Supp. 717, order at CCH Pov. L. Rptr. Transfer Binder ¶10,506 (S.D. N.Y. 1969); *Shapiro* v. *Thompson*, 394 U.S. 618, affirming 270 F. Supp. 331 (D. Conn. 1967) authorized retroactive relief; and

(2) Retroactive relief does not constitute damages but merely restitution and is required so that "a federal court's equitable intervention may take an effective form". P. 997.

The Second Circuit had ruled that the affirmances by the Supreme Court in *Sterrett, Zarate, Gaddis* and *Shapiro* were not authoritative and the ordering of retroactive relief exceeded the Federal Court's equity jurisdiction.

The Seventh Circuit held additionally that even assuming the Eleventh Amendment "stood in the way of plaintiffs' suit to recover welfare benefits wrongfully withheld, Illinois has constructively consented to order such an action." P. 1001. The Seventh Circuit found that the State had consented to such action "by participating in the Federal AABD Plan [and] thereby agreeing to comply with the federal statutes and regulations and by receiving federal funds."

The Second Circuit held that the State of New York did not consent constructively to suit by participating in the exact same program.

Factual differences between the instant case and *Jordan* do not explain the disparate results. The District Court in

the instant case had held that on the merits, petitioners were entitled to relief even assuming that "conclusory" affidavits submitted on a motion for reargument were accepted as correct.[2] Appendix C-5. The Second Circuit did not point to any extraordinary facts for its holding; indeed, it made its ruling as broad and sweeping as possible, phrasing the holding in terms of the jurisdiction of the court to grant relief.

The issue presented herein and in *Jordan* is one of great significance and the subject of a substantial amount of litigation in the lower courts both prior and subsequent to the filing of the petition in the instant case. See Petition page 10. Since the filing of the petition this issue has been litigated not only in *Jordan* but also in *Story* v. *Roberts*, 352 F. Supp. 473 (M.D. Fla. December 20, 1972) (*Rothstein* held to be "in conflict with the weight of authority," p. 477).[3] See also *Like* v. *Carter*, —— F. Supp. ——, 41 U.S.L.W. 2406 (E.D. Miss., Jan. 16, 1973) and *Weisenberger* v. *Huecker*, —— F. Supp. —— C.C.H. Pov. L.R. ¶16,656 (W.D. Ky. Jan. 15, 1973) which are in accord with *Rothstein* and in part the decisions of the courts relied thereon.

Three cases, *Dawkins* v. *Craig*, —— F. Supp. —— (W.D.N.C. 1972; argued before the 4th Cir. on April 4,

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[2] A hearing was never held in connection with claims by respondents herein of administrative burdens and costs involved in the making of retroactive payments. The district court found that even if such claims were accepted the equities required that respondents make such payments. Should the extent of the burdens and amount of the costs involved in making retroactive payments be crucial as to the availability of such relief, this court might remand for a hearing to determine the facts.

[3] Appeal has been filed to this court by the State welfare commissioner from the order of a three-judge court in *Edelman* v. *Townsend*, 41 L.W. 3359 (March 26, 1973). The sole question presented is whether the Eleventh Amendment is a jurisdictional bar to the granting of retroactive assistance benefits by a federal court.

1973); *Smith* v. *Likens,* D.C. Minn. 4th Div. 472 Civ. 71, and *Thompson* v. *Simmons,* D.C. Minn. 4th Div. 473 Civ. 953 are presently pending and not yet decided and involve as the sole remaining issue the jurisdiction of the court to grant retroactive public assistance benefits wrongfully withheld.

It is respectfully submitted that the issues presented in the instant case require immediate resolution by the Supreme Court. They are significant and the subject of irreconcilable conflict within the circuits.

CONCLUSION

Intervening cases demonstrate the development of a conflict within the federal district courts and Courts of Appeals on the issue of the jurisdiction of the Federal courts to direct payment of retroactive benefits wrongfully withheld. Resolution of this conflict is needed to insure the uniform dispensation of justice and to protect the interests of petitioners herein. It is respectfully requested that this petition for rehearing and the petition for certiorari be granted.

Dated: April 25th, 1973.

Respectfully submitted,

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Certificate of Counsel

I, NORMAN B. LICHTENSTEIN, one of the counsel for the petitioners herein, hereby certify that this petition for rehearing pursuant to Rule 58 (2) is presented in good faith and not for delay and that petition is restricted to the grounds specified in Rule 58 (2).

NORMAN B. LICHTENSTEIN